

Remarks

Entry of the foregoing amendments in the specification and claims is requested pursuant to 37 C.F.R. § 1.116(b)(2) & (b)(3).

The specification is amended herein pursuant to 37 C.F.R. § 1.116 (b)(3). In particular, the specification has been amended to cancel a previous amendment wherein a sentence reading “More than 94% of the adherent population was CD90 and CD49c positive (Figure 1B)” from Example 1” was moved from the paragraph beginning on line 18 of page 26 and bridging to page 27, line 8 to Example 3, in the paragraph beginning on line 22 of page 28. The previous amendment was objected to by the Examiner as allegedly introducing new matter. On June 16, 2009, Applicants filed a Petition Under 37 C.F.R. § 1.181 requesting reconsideration of the Examiner’s objection. Applicants’ petition was denied pursuant to a decision mailed July 14, 2009. Therefore, Applicants submit the present amendment to cancel the alleged new matter by deleting the sentence from the location where it was placed via the previous amendment and inserting this sentence in the same location in the specification as originally filed.

Likewise, the specification is amended herein to cancel the previous parallel amendment of Example 3 by deleting the phrase “more than 91% of the adherent population was CD90 and CD49c positive (Figure 2B) and” from the paragraph beginning on line 22 of page 28 and inserting this phrase in original sentence form (“More than 91% of the adherent population was CD90 and CD49c positive (Figure 2B)”) in the same location in the specification as originally filed (*i.e.*, in Example 2, beginning on line 27 of page 27 and bridging to line 6 of page 28).

No new matter has been added.

Applicants note that these amendments could not have been introduced earlier because the first objection to the alleged new matter was not asserted by the Examiner until mailing of the currently pending final office action and Applicants only thereafter were able to obtain a subsequent disposition from the U.S.P.T.O. based on Applicants’ Petition under 37 C.F.R. § 1.181.

Claim 97 is amended herein pursuant to 37 C.F.R. § 1.116(b)(2). In particular, the Examiner has rejected claim 97 under 35 U.S.C. § 112, second paragraph, as allegedly being indefinite. In particular, the Examiner has rejected claim 97 based on recitation of "low oxygen" allegedly because "it is unclear what the intended metes and bounds of a 'low oxygen' condition are." *See*, Final Office Action, page 5, last two paragraphs.

Pursuant to 37 C.F.R. § 1.116(b)(2), in the interest of presenting rejected claim 97 in better form for consideration on appeal (but without acquiescence or disclaimer of claims encompassing a low oxygen condition which is less than atmospheric oxygen), Applicants have herein amended claim 97 to be drawn to an isolated cell population obtainable by a process comprising incubating human bone marrow cells under a low oxygen condition *of about 5% oxygen*. Support for this amendment can be found in the specification as originally filed, for example, at: page 8, lines 11-12; page 12, line 1; page 15, line 8; and, Example 3, page 28, lines 18-19.

The Examiner has also rejected claim 97 under 35 U.S.C. § 112, first paragraph, as allegedly "failing to comply with the written description requirement." The Examiner states that "New claim 97 is rejected for containing new matter" because "[t]he examples cited for support do not contain the limitation of a seeding density of 'less than about 2500 cells/cm²...'." *See*, Final Office Action, page 5, first and second paragraphs.

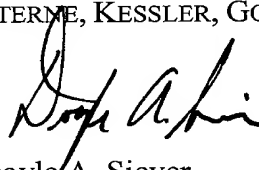
Pursuant to 37 C.F.R. § 1.116(b)(2), in the interest of presenting rejected claim 97 in better form for consideration on appeal (but without acquiescence or disclaimer of claims encompassing seeding densities of less than about 2500 cells/cm²), Applicants have herein amended claim 97 to be drawn to an isolated cell population obtainable by a process comprising passaging cells at a seeding density of about 30 cells/cm². Support for this amendment can be found in the specification as originally filed, for example, at page 3, lines 13-17; page 12, lines 4-7; Example 3, page 28, lines 16-17; and, Example 4, page 29, lines 12-13.

Conclusion

Applicants respectfully request entry of the amendments in the specification and claims presented herein to simplify the issues necessary for consideration upon appeal.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Doyle A. Siever".

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